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No. 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RESERVE LIFE INSURANCE COMPANY, a corporation,
Petitioner,

v.

DONALD E. MARR, as Executor of the Estate of
Mary E. Marr, Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

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v.

DONALD E. MARR, as Executor of the Estate of
Mary I. Marr, Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is printed in the Appendix hereto (App. 1a). It is reported at 254 F. 2d 289. There was no opinion in the District Court. The District Court's findings of fact and con-

clusions of law are printed at pages 27-36 of the Record herein.

JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1958 (App. 6a). Rehearing was denied May 27, 1958 (App. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case involves a suit on two hospital insurance policies which define the word "hospital" to mean an institution which has a laboratory, an operating room where major surgery may be performed, and facilities for the care of patients under the supervision of a doctor. Respondent's ward was confined in an institution which had, actually, none of these requirements. Despite this, the judgment of the Court of Appeals has allowed recovery under the terms of the policy. There are presented to this Court the following two questions:

(1) Has not the Court of Appeals by this decision so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for the exercise of this Court's power of supervision?

(2) Has not the Court of Appeals by this decision decided an important state question in a way in conflict with applicable state law so that correction by this Court is required?

STATUTES INVOLVED

Texts of the following pertinent statutes of the State of Washington are printed in the Appendix to this petition: *Nursing Homes*, R.C.W. 18.51; *Hos-*

pital Licensing and Regulations, R.C.W. 70.41; *Alcoholics, Private Establishments for the Mentally Ill*, R.C.W. 71.12.460.

STATEMENT

This case is a civil action to recover benefits for hospital expenses under two policies of insurance issued by petitioner. It was heard in the United States District Court for the Eastern District of Washington (R. 4-6) because of diversity of citizenship, respondent's ward being a citizen of Washington and petitioner a citizen of Texas (R. 7-8).

Each of the policies of insurance provides for payment of hospital expenses if the insured is "necessarily confined within a recognized Hospital" (R. 17, 21). Each defines "Hospital" as follows:

> "The word 'hospital' wherever used in this policy means an institution which has a laboratory, X-ray equipment and an operating room where major surgical operations may be performed, and which maintains permanent and full-time facilities for the care of overnight resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy and which has a Graduate Registered Nurse always on duty." (R. 18, 22)

Following a slight stroke, respondent's ward was on January 29, 1956, placed in a licensed nursing home operated under the name and style of "Jane O'Brien Hospital" (R. 141-2). This institution had from its inception in 1943 or 1944 been operated as either a nursing home or a psychiatric hospital (R. 89, 106-9). From 1954 through July 1, 1956, it was licensed and operated as a nursing home under state law, R.C.W. 18.51, *Nursing Homes* (R. 89, 124). From July 1, 1956, to date of the trial it was licensed as a psychiatric

hospital under state law, R.C.W. 71.12, *Alcoholics, Private Establishments for the Mentally Ill* (R. 89).

The Record discloses the following facts pertinent to express requirements of the definition in both the contracts of insurance:

"*an institution which has a laboratory*"

Neither Jane O'Brien, the original owner, nor Havens, Inc., the present owner of "Jane O'Brien Hospital", maintained a laboratory at the institution where the usual analyses and testing procedures could be performed (R. 94-97). With the exception of urinalysis for diabetic testing, all laboratory work was taken out, either to a commercial laboratory or to a general hospital laboratory (R. 94-97).

"*an operating room where major surgical operations may be performed*"

No operating room or surgery of any type was maintained (R. 93, 120). There were no facilities for surgery, anesthesia or obstetrics (R. 93-94, 120).

"*under the supervision of a licensed Doctor*"

Neither the administrator of the institution nor anyone in any way connected with the corporation which owned it was a licensed doctor (R. 88). There was, in fact, no doctor in any way connected or associated with this institution and no doctor available during the nighttime (R. 93).

"Recognized" hospitals are licensed in the State of Washington under R.C.W. 70.41, *Hospital Licensing and Regulations.* The institution involved in this case has never even made application for such a license (R. 92). It is not accredited by the American Hospital Association or the Joint Commission on Ac-

creditation of Hospitals (R. 131, 135). It is not recognized by the accrediting agency of the American College of Physicians, American College of Surgeons, American Hospital Association, American Medical Association and Canadian Medical Association (R. 139-140). It is not a member of the Blue Cross hospitalization program (R. 100, 122). It is not recognized as a duly constituted hospital by national insurance carriers (R. 154-155). It is not recognized as a hospital for purposes of hospitalization payments by the Spokane Medical Bureau, a hospitalization program sponsored by the Spokane County Medical Association (R. 138). So far as the record shows, no claim for expenses incurred at this institution has ever been paid before under a policy requiring confinement in a recognized hospital defined in the policy.

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals In This Decision Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings And So Far Sanctioned Such A Departure By A Lower Court As To Call For The Exercise Of This Court's Power of Supervision

Rule 19(1)(b) of the Rules of this Court lists a radical departure from the accepted and usual course of judicial proceedings as one of the important reasons which will move it to grant certiorari. If this standard is to have any meaning, it must be invoked in the present case. The decision as it presently stands is incredible.

It is well established that this Court "has the power to do justice as the case requires." *Tinder* v. *United States*, 345 U.S. 565, 570; *Patterson* v. *Alabama*, 294

U.S. 600, 607; *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 676; *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 555. In the recent case of *Gibson* v. *Lockheed Aircraft Service*, 350 U.S. 356, this Court referred in its per curiam opinion to that case as one in which in the exercise of the Court's "supervisory powers over the lower federal courts, the judgment of the Court of Appeals should be reversed in the interests of justice." 350 U.S. at 357. Mr. Justice Frankfurter, concurring separately in the *Gibson* case, agreed that in a case which was "obviously and injuriously erroneous" it was proper "to call for an exercise of this court's power of supervision," and noted in addition that this was "one of the considerations within [the Court's] Rule governing review on certiorari. Rule 19(1)(b)." 350 U.S. at 358.

There is ample precedent for granting a writ of certiorari to review the construction of an important contract between the parties. See *United States* v. *Nielson*, 349 U.S. 129, where this Court recently granted certiorari in order "to consider the meaning and validity of the pilotage clause" in a contract between a tug owner and the owner of the towed vessel. 349 U.S. at 130-131.

The definition of "hospital" and provision for payment under the policies in this case could scarcely be clearer. If the English language is to retain a degree of precision which will allow people to regulate their affairs and if the federal courts are to retain the respect which is properly their due, these provisions must be given effect. Unlike many hospitalization insurance contracts, these contracts precisely define the term "hospital". Each policy provides:

> "The word 'hospital' wherever used in this policy means an institution which has *a laboratory*, X-ray equipment and an *operating room where major surgical operations may be performed*, and which maintains permanent and full-time facilities for the care of overnight resident patients *under the supervision of a licensed Doctor of Medicine or Osteopathy* and which has a Graduate Registered Nurse always on duty." [Emphasis supplied.]

None of the italicized requirements in this definition was met by the institution in which the confinement here occurred. This institution had "a laboratory" only to the extent that any private person who may use the facilities of a commercial laboratory may be considered to "have" such a laboratory. There was a complete failure to provide any type of operating room or surgery. Throughout the entire record not one scintilla of testimony would indicate that *any* "licensed Doctor of Medicine or Osteopathy" was in any way associated or had ever been associated with this institution.

The seriousness of the result reached by the Court of Appeals is easily demonstrated. If respondent's ward had been confined to her home rather than the "Jane O'Brien Hospital", it is obvious that the Court of Appeals opinion could as easily justify payment in that circumstance as in this. The laboratory requirement presents no difficulty if test work may be "sent to an independent laboratory under a contractual arrangement." 254 F. 2d at 290. The requirement for an operating room would be met if "an arrangement existed whereby the operating room facilities of the Sacred Heart Hospital, one and one-half blocks away,

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Patterson v. *Alabama*, 294 U.S. 600 (1935) 5
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Walling v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944) 6

STATUTES OF STATE OF WASHINGTON:

Alcoholics, Private Establishments for the Mentally Ill, R.C.W. 71.12 ..... 8a
Hospital Licensing and Regulations, R.C.W. 70.41 .. 7a
Nursing Homes, R.C.W. 18.51 ..... 6a

were available if the patient's doctor wished to use them." *Ibid.* Merely the patient's being "under the care of his own physician", 254 F. 2d at 291, would satisfy the policies' seemingly clear requirement that the "hospital" facilities be "under the supervision of a licensed Doctor." It is well known that the private homes of many aged and infirm people now have the services of a full-time registered nurse, facilities for administering oxygen and taking blood samples and similar equipment referred to in the Court of Appeals opinion. Under this opinion the substance of the insurance agreement is disregarded and there remains no real barrier to payment for confinement at home under the terms of a hospitalization policy.

The opinion below is a flagrant example of judicial rewriting of a contract agreed to by two private parties. It involves a radical departure from the usual course of judicial proceedings because the express requirements of the policies are clear and unambiguous and not subject to interpretation. Judicial proceedings have traditionally been controlled by the rule that contracts of insurance are construed as other contracts, *Liverpool & L. & G. Ins. Co.* v. *Kearney*, 180 U.S. 132, 135-6, and, where language is not ambiguous, the intention of the parties is to be gathered from the policy alone. *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U.S. 527.

This Court has long recognized that the rule of construction that an ambiguous policy will be interpreted in favor of the insured furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by giving plain words unusual or unnatural meanings. *Bergholm* v. *Peoria Life Ins.*

Co., 284 U.S. 489. As this Court stated in the *Bergholm* case:

> ". . . to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long-settled principles." 284 U.S. at 492.

This language is aimed directly at the extraordinary action taken by the courts below in this case. No system of laws can remain secure and no contract will be entitled to respect in an atmosphere where, as here, an insurance contract may be rewritten in its essential provisions by a court.

II.

The Court Of Appeals By This Decision Has Decided An Important State Question In A Way In Conflict With Applicable State Law So That Correction By This Court Is Required

There is a second compelling reason for review of this case on certiorari. The decision below is squarely contrary to the law of the State of Washington as that law is expressed both in the statutes and in the decisions of the state's highest court. The question involved is of manifest importance to the thousands of policyholders who pay the annual premiums aggregating twenty million dollars on policies issued by petitioner which contain this definition.

Washington has a comprehensive statutory system for the regulation of hospitals, nursing homes and institutions for the care of alcoholic and psychiatric patients. In Section 70.41.020 of the Revised Code of

Washington it is provided that the term "hospital" means:

> "any institution, place, building, or agency which provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis, or care, of . . . individuals . . . suffering from illness, injury, deformity or abnormality, or from any other condition for which obstetrical, medical, or surgical services would be appropriate for care or diagnosis. '*Hospital*' *as used in this chapter does not include . . . nursing homes,* as defined and which come within the scope of chapter 18.51 R.C.W." [Emphasis supplied.]

It is obvious that the institution involved in this case could not qualify as a hospital under this definition, and, in fact, it has never even applied for such a license.

On the date of entry of respondent's ward to this institution, and for a period of five months thereafter, it was licensed under state statute as a Nursing Home and thus under state law expressly excluded from definition as a hospital. R.C.W. 18.51.010 provides the following definition of a Nursing Home:

> "'Nursing Home' means any home, place or institution which operates or maintains facilities providing convalescent or chronic care, or both, for a period in excess of twenty-four consecutive hours for . . . patients . . . who by reason of illness or infirmity, are unable properly to care for themselves. Convalescent and chronic care may include but not be limited to any or all procedures commonly employed in waiting on the sick, such as administration of medicines, preparation of special diets, giving of bedside nursing care, application of dressings and bandages, and carrying out of treatment prescribed by a duly licensed practi-

> tioner of the healing arts. . . . Nothing in this definition shall be construed to include general hospitals or other places which provide care and treatment for the acutely ill and maintain and operate facilities for major surgery or obstetrics, or both."

It is also apparent that under the law of the State of Washington the Nursing Home legislation continued to apply to the institution in question throughout the entire time of confinement. On July 1, 1956, the institution was licensed under R.C.W. 71.12 relating to *Alcoholics, Private Establishments for the Mentally Ill.* The *Nursing Home Act,* however, provides:

> ". . . The mere designation by the operator of any place or institution as a hospital, sanitarium, or any other similar name, which does not provide care for the acutely ill and maintain and operate facilities for major surgery or obstetrics or both shall not exclude such place or institution from the provisions of this chapter." R.C.W. 18.51.010

For this reason the confinement of persons for other than alcoholic or psychiatric treatment continues to be governed by the *Nursing Home Act* and therefore the institution remains excluded from consideration as a hospital.

Thus, although the policies require for payment that confinement be within a "recognized Hospital", in this instance the insured was actually confined in an institution which was not only not "recognized" as a hospital by a single hospital or medical organization, but was not "recognized" by any known insurance company. More important, however, this institution was under R.C.W. 18.51.010, expressly *excluded* by state law from consideration as a "hospital."

The decision below is as much at war with the settled jurisprudence of the State of Washington as it is with the statutes of that state. The Supreme Court of Washington has stated with emphasis that courts cannot rule out of a contract language which the parties themselves have included, that a court may not revise a contract under the theory of construing it and that there is no justification for the creation of a contract which the parties did not make themselves or the imposition on one party to a contract of an obligation which he did not assume in the contract itself, *Evans* v. *Metropolitan Life Ins. Co.*, 26 Wash. 2d 594, 174 P. 2d 961. Repeatedly, the highest state court has scored the making of a plain agreement ambiguous in order to construe it in favor of an insured, *Miller* v. *Penn Mutual Life Insurance Co.*, 189 Wash. 269, 64 P. 2d 1050, and the creation of ambiguities where none existed in order to enlarge the risk coverage by use of rules of construction, *Hamilton Trucking Service* v. *Automobile Insurance Co.*, 39 Wash. 2d 688, 237 P. 2d 781 (1951). The decision below is flatly contrary to the sound principles of these cases.

In a recent hospitalization insurance case the Supreme Court of Washington denied recovery after confinement in an institution substantially the equivalent of "Jane O'Brien Hospital". *Rew* v. *Beneficial Standard Ins. Co.*, 41 Wash. 2d 577, 250 P. 2d 956. In the *Rew* case, rest, convalescent and nursing homes were excluded by language no more specific than the precise definition of "hospital" in the present case.

CONCLUSION

This cause is by any standards an exceptional departure from the usual course of judicial proceedings and it is in direct conflict with applicable state law. For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

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STEPTOE & JOHNSON
Of Counsel

APPENDIX

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,721
Apr. 23, 1958

RESERVE LIFE INSURANCE COMPANY, a corporation,
Appellant

v.

DONALD E. MARR, as Executor of the Estate of
Mary I. Marr, Deceased, *Appellee.*

Appeal from the United States District Court
for the Eastern District of Washington, Northern Division.

Before: ORR, CHAMBERS and BARNES, *Circuit Judges*

ORR, *Circuit Judge:*

Effective May 4, 1954, appellant Reserve Life Insurance Company, hereafter company, issued two Insurance Policies to one Mary I. Marr, hereafter insured, wherein the company agreed to pay certain therein named hospital expenses if and when incurred by insured. She is now deceased. Appellee Donald E. Marr is administrator of her estate.

At age 70 the insured suffered a stroke and on her doctor's orders was taken to the Jane O'Brien Hospital in Spokane, Washington. Her condition stabilized after several weeks, but she remained partially incapacitated phy-

sically and required medicinal and nursing care. Insured was hospitalized for 14 months, receiving medicinal treatment and care by her physician. She made claim for the medical and hospital expenses incurred. The company denied the claim on the ground that the hospital in which insured was treated did not meet the standards set up in the policies. Suit was brought and a judgment rendered in favor of appellee.

The two policies contained identical definitions of the word "hospital" as used in the wording of a condition therein to the effect that in order to recover the insured must "be necessarily confined within a recognized hospital" (policy J) or "be necessarily confined within a recognized hospital (as defined in part 2 hereof)" (policy A). That definition is as follows:

> "The word 'hospital' wherever used in this policy means an institution which has a laboratory, X-Ray equipment and an operating room where major surgical operations may be performed, and which maintains permanent and full time facilities for the care of overnight resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy and which has a Graduate Registered Nurse always on duty."

The trial court found that the Jane O'Brien Hospital in which insured was confined was licensed by the State of Washington to maintain 61 beds and had a daily average of 50 patients for the year in question. At the time of the insured's admission to the hospital, it was licensed as a "nursing home". It is now licensed as a "psychiatric hospital" and was so licensed for several years prior thereto. It had a registered nurse on duty at all times, X-Ray facilities, and full-time facilities for overnight resident patients, for administering oxygen, and for taking blood samples.

That the above enumerated facilities were furnished is not contested, but it is contended that further requirements contained in the policy definition were not met, in that the hospital was not "*an institution which has a laboratory.*" There was a laboratory on the premises; laboratory test work however was regularly sent to an independent laboratory under a contractual arrangement. It is conceded that these facilities so utilized were adequate. But, argues the company, no matter how available and efficient the facilities were, they must have been under the same roof or within an integrated hospital facility in order to meet the definition contained in the policy. The policies do not specifically require that the laboratory be within the confines of a building or buildings owned and operated by the hospital as an integrated whole.

There was no operating room on the premises where major operations could be peformed, but an arrangement existed whereby the operating room facilities of the Sacred Heart Hospital, one and one-half blocks away were available if the patient's doctor wished to use them.

Here again we find no requirement in the policies that the operating room be on the premises or within the confines of a building or buildings operated by the hospital as an integrated whole. *McKinney* v. *American Security Life Ins. Co.* 76 So.2d 630 (La.App. 1954).

There is no requirement in the policies that the insured be confined in a "general" hospital nor is there any exclusion from the term "hospital" of a psychiatric or nursing hospital as there was in *Rew* v. *Beneficial Standard Ins. Co.* 41 Wn.2d 577 250 P.2d 956 (1952) relied on by the company.[1] These policies were not limited to surgical benefits and covered costs of "hospital confinement . . . (b) resulting from sickness. . . ." Reference was specifically

[1] There is instead only a specific exclusion of "hospitalization for nervous or mental disorders, rest cure or alcoholism."

made therein to "any disease of the heart or circulatory system," and the coverage here sued upon was the provision for expenses of a "HOSPITAL ROOM, including meals and *general nursing care.*" (italics supplied).

Another argument concerning the definition is directed toward the requirement that the hospital maintain "permanent and full time facilities for the care of over-night resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy." Appellant urges that this requires supervision by a Doctor of the hospital facilities rather than of the patients, so that administrative control of the hospital would be by licensed doctors. The Jane O'Brien Hospital did not have a doctor as its director but was managed by a person who had had over eight years experience in hospital management work, with pre-medical training and two years of medical school, and experience in operating a medical laboratory.

It is apparent that the portion of the definition here relevant is ambiguously stated, so that the supervision phrase can be read to modify either the "facilities" themselves or the "patients" using such facilities. If read the latter way, there was admittedly sufficient compliance, for each patient was under the care of his own physician. It may well be that higher standards of operation of a hospital could be insured if the hospital is administered by a licensed doctor. The policies in question do not unequivocally contain such a requirement, and the ambiguity was properly construed by the trial court in favor of the policy holder. *McCarty* v. *King County Medical Service Corp.*, 26 Wn.2d 660, 175 P.2d 653 (1946); *Dorsey* v. *Strand*, 21 Wn.2d 217, 222, 150 P. 2d 702, 705 (1944); *Doke* v. *United Pacific Ins. Co.*, 15 Wn.2d 536, 131 P.2d 436 (1942).

The trial court found that the facilities furnished substantially complied with the terms of the policy. A policy will be liberally construed in favor of the object to be accomplished and conditions and provisions therein will be

strictly construed against the insurer. *Jack* v. *Standard Marine Ins. Co.*, 33 Wn.2d 533, 205 P.2d 351 (1949). Undoubtedly the object to be accomplished by the insertion in the policy of a statement of the facilities to be available was to meet the standard of a hospital which the company determined would guarantee to the policy holders a high standard of care when hospitalized. This was undoubtedly on the theory that the better the care the sooner the patient would be released and thereby minimize the expense to the company. If such be the object to be accomplished, what difference would it make to a recovery whether the named facilities were under one management so long as the care was expertly provided and readily at hand? In so deciding we are not disregarding plain and explicit language, but are holding that a liberal construction of the language of the policies supports the finding of the trial court that the facilities furnished by the hospital in which the insured was confined were in substantial compliance with the definition of a "hospital" contained in the policy.

Appellant attacks a finding of the trial court that the insured was "necessarily confined" within the meaning of the policy. It is not disputed that the insured's confinement was under the direction of her doctor, nor is it shown that he improperly so directed, or that her confinement was not the result of a sickness covered by the terms of the policy. This contention is essentially the same as that made to the effect that the policy covers only "general hospital" type confinements, with which we have heretofore dealt.

Affirmed.

Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,721

RESERVE LIFE INSURANCE COMPANY, a corporation,
Appellant

v.

DONALD E. MARR, as Executor of the Estate of
Mary I. Marr, Deceased, *Appellee.*

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: April 23, 1958

Texts of Statutes Involved

NURSING HOMES

R.C.W. 18.51.010 Definitions. (1) "Nursing home" means any home, place or institution which operates or maintains facilities providing convalescent or chronic care, or both, for a period in excess of twenty-four consecutive hours for three or more patients not related by blood or marriage to the operator, who by reason of illness or infirmity, are

unable properly to care for themselves. Convalescent and chronic care may include but not be limited to any or all procedures commonly employed in waiting on the sick, such as administration of medicines, preparation of special diets, giving of bedside nursing care, application of dressings, and bandages, and carrying out of treatment prescribed by a duly licensed practitioner of the healing arts. It may also include care of mentally incompetent persons if they do not require psychiatric treatment by or under the supervision of a physician who devotes all or a major portion of his time to this specialized field of medicine. Nothing in this definition shall be construed to include general hospitals or other places which provide care and treatment for the acutely ill and maintain and operate facilities for major surgery or obstetrics, or both. Nothing in this definition shall be construed to include any boarding home, guest home, hotel or related institution which is held forth to the public as providing, and which is operated to give only board, room and laundry to persons not in need of medical or nursing treatment or supervision except in the case of temporary acute illness. The mere designation by the operator of any place or institution as a hospital, sanitarium, or any other similar name, which does not provide care for the acutely ill and maintain and operate facilities for major surgery or obstetrics, or both, shall not exclude such place or institution from the provisions of this chapter.

HOSPITAL LICENSING AND REGULATIONS

R.C.W. 70.41.020 Definitions. Unless the context clearly indicates otherwise, the following terms, whenever used in this chapter, shall be deemed to have the following meanings:

* * *

(3) "Hospital" means any institution, place, building, or agency which provides accommodations, facilities and services over a continuous period of twenty-four hours or more, for observation, diagnosis, or care, of two or more

individuals not related to the operator who are suffering from illness, injury, deformity, or abnormality, or from any other condition for which obstetrical, medical, or surgical services would be appropriate for care or diagnosis. "Hospital" as used in this chapter does not include hotels, or similar places furnishing only food and lodging, or simply domiciliary care; nor does it include clinics, or physician's offices where patients are not regularly kept as bed patients for twenty-four hours or more; nor does it include nursing homes, as defined and which come within the scope of chapter 18.51; nor does it include maternity homes, which come within the scope of chapter 18.46; nor does it include psychiatric hospitals, which come within the scope of chapter 71.12; nor any other hospital, or institution specifically intended for use in the diagnosis and care of those suffering from mental illness, mental retardation, convulsive disorders, or other abnormal mental condition. Furthermore, nothing in this chapter or the rules and regulations adopted pursuant thereto shall be construed as authorizing the supervision, regulation, or control of the remedial care or treatment of residents or patients in any hospital conducted for those who rely primarily upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well recognized church or religious denominations; * * *

ALCOHOLICS, PRIVATE ESTABLISHMENTS FOR THE MENTALLY ILL

R.C.W. 71.12.460 Private establishments for the care of mentally ill—License—Penalty. No person, association, or corporation, shall establish or keep, for compensation or hire, an establishment for the care, custody, or treatment of the insane, alleged insane, mentally ill, or other incompetent persons referred to in this chapter without first having obtained a license therefor from the department of public health, and having paid the license fee provided in this chapter. Any person who carries on, conducts, or

attempts to carry on or conduct an establishment for the care or treatment, or for the care and treatment of the insane or alleged insane, mentally ill, or incompetents without first having obtained a license from the department of public health, as in this chapter provided, is guility of a misdemeanor and on conviction thereof shall be punished by imprisonment in a county jail not exceeding six months, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. The managing and executive officers of any corporation violating the provisions of this chapter shall be liable under the provisions of this chapter in the same manner and to the same effect as a private individual violating the same.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, May 27, 1958

Before: ORR, CHAMBERS and BARNES, *Circuit Judges*

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant, filed May 21, 1958, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

LIBRARY
SUPREME COURT, U.S.

No. 287

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RESERVE LIFE INSURANCE COMPANY, a corporation
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v.

DONALD E. MARR, as Executor of the Estate of Mary I. Marr, Deceased, *Respondent.*

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 287

RESERVE LIFE INSURANCE COMPANY, a corporation
Petitioner,

v.

DONALD E. MARR, as Executor of the Estate of Mary I. Marr, Deceased, *Respondent.*

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT

A civil action was commenced in July, 1956, in the State Court on two policies of hospital insurance issued by petitioner to Mrs. Marr on May 4, 1954. Petitioner, a Texas corporation, removed the suit to the United States District Court for the Eastern

District of Washington (R. 4-6) on diversity of citizenship, respondent's ward residing in Washington. After trial before the Court, decision finding that there had been substantial compliance with the definition as contained in the policies was given in favor of respondent (R. 159-160) followed by Findings of Fact, Conclusions of Law (R. 27) and Judgment (R. 36), standard procedure in both State and Federal Courts in Washington.

The two policies contained identical definitions of the word "hospital" as used in the wording of a condition therein to the effect that in order to recover the insured must "be necessarily confined within a recognized hospital" (Policy J) or "be necessarily confined within a recognized hospital (as defined in part 2 hereof)" (Policy A). That definition is as follows:

> "The word 'hospital' wherever used in this policy means an institution which has a laboratory, x-ray equipment and an operating room where major surgical operations may be performed, and which maintains permanent and full time facilities for the care of overnight resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy and which has a Graduate Registered Nurse always on duty."

There was substantial material evidence admitted in the trial that Jane O'Brien Hospital has been a recognized hospital in the area for ten years (R. 70, 74). Evidence proved that the hospital had 40 rooms,

61 beds, a Graduate Registered Nurse always on duty, x-ray equipment, laboratory, (nurses take blood samples, but most of lab work is sent out to Physicians Clinical Laboratories, managed by a doctor specializing in Pathology), arrangements with Sacred Heart Hospital, 1½ blocks away, where major surgery could be performed on Jane O'Brien Hospital patients, each patient under the supervision of a medical doctor, permanent and full time facilities for the care of overnight resident patients. (R. 77, 78, 79). Also had acutely ill, post operative, orthopedic, the aged, psychiatric patients and on occasions pediatric cases. (R. 80). X-ray pictures were taken and turned over to a doctor specializing in Radiology for reading and interpretation. (R. 80-81).

No provision in either policy limited the hospital services to general hospitals, or to a hospital certified by or accredited by any national association of hospitals or association of doctors. No particular type of hospital was excluded from the coverage.

From an adverse decision Petitioner appealed to Circuit Court of Appeals, 9th Circuit, where after Briefs and Argument before that Court, the decision of the District Court was unanimously affirmed April 23, 1958, (App. 6a) and re-hearing denied May 27, 1958 (App. 9a).

RESPONDENT'S ARGUMENT

I

To Petitioner's Reason 1.

Upon a trial without a jury, in which the Court found the issues in favor of Plaintiff, the Appellate Court must take that view of the evidence most favorable to the Plaintiff. *Kansas City Stockyards Co. v. Anderson*, 36 A.L.R. 2d. 1, 199 F. 2d. 91. *Worthington v. McDonald*, 47 A.L.R. 2d. 135-Iowa, 68 N.W. 2nd. 89. *Keller Products Inc. v. Rubber Lining Corp.* 47 A.L.R. 2d. 1108, 213 F. 2d. 382.

It is not the function of the Court on appeal to weigh evidence or draw inferences therefrom; it may not re-try doubtful issues of fact and substitute its judgment for that of the trial court. *United States v. First Security Bank of Utah*, 42 A.L.R. (2d.) 951, 208 F. (2d.) 424.

The Appellate Court is prohibited, under Rule 52(a) of the Federal Rules of Civil Procedure, from setting aside the trial courts' Findings of Fact unless it is clearly erroneous. *Lassiter v. Guy F. Atkinson Co.*, 21 A.L.R. (2d.) 1313, 176 F. (2d.) 984.

The Findings were supported by substantial evidence and authorized the Conclusions of Law and the Judgment of the District Court.

While the number of cases construing hospital policies are rather limited, they hold that the policies should be liberally construed to carry out the beneficient purposes for which the insurance was issued. Vol. I. Appleman, Insurance Law and Practice, Section 705, Disability and Specific Loss where this text says:

> "Where there is any ambiguity as to hospital benefits recoverable, a rather liberal construction will be taken to afford protection to the insured."

This section of Appleman cites in Note 27, *Colorado Life Co. v. Polk,* 83 S. W. (2d) 534, and in the pocket supplement of Vol. I. Appleman is cited *McKinney v. American Security Life Ins. Co.* 76 So. (2d) 630 (La. App. 1954) and *Hesse v. U. S. F. & G. Co.* 143 Ore. 700, 21 P. (2d) 1090.

Borglund v. World Ins. Co. (Ore) 315 P. (2d) 158, in its opinion quotes with approval *National Life and Accident Ins. Co. v. Davies* 34 Ala. App. 290, 39 So. (2d) 697, 700, certiorari denied 252 Ala. 107, 39 So. (2d) 703, which is quoted page 161 of 315 P. (2d) as follows:

> "This policy should be construed according to its character and its beneficient purposes, and in the sense in which insured had reason to suppose it was understood. It is not a question of what the words contained in the contract literally or figuratively mean, but instead what was their intended meaning when taken in connection with their use in the instrument."

The identical definition of a hospital as contained in Petitioner's policies issued in 1954 to Mrs. Marr has been construed in *McKinney v. American Sec. Life Ins. Co.* (La. App. 1954) 76 So. (2d) 630. The Louisiana hospital, the Court held, substantially fulfilled the definition even though it had all of its x-ray work done in a near by town, and did not have a Registered Nurse on duty at all times. This McKinney case has been cited with approval by the Supreme Court of Louisiana in *Seguin v. Continental Service Life Ins. Co.* 89 So. (2d) 113, 230 La. 533; 55 A.L.R. (2d) 1014. Also by the Federal District Court in *Pipes v. World Ins. Co.* 150 Fed. Sup. 370, U. S. Dist. Ct. West. Dist. La. The annotation in 35 A.L.R. (2d) 897 and A.L.R. Supplement Service under that annotation entitled "What constitutes a 'hospital' within coverage or exclusionary clauses of hospitalization policy" cites McKinney v. Am. Sec. Life Ins. Co. and other cases on this subject.

Following the cases cited above it clear that both the District Court and the 9th C.C.A. followed, accepted and usual judicial proceedings in deciding and affirming the instant case, and also followed all federal and state cases that have decided hospitalization policies.

II

Respondent's Argument on Petitioners Reason II for Granting the Writ.

Both hospital policies were drawn by a Texas corporation, make no reference to any statutes of Washington. They were issued to Respondent's ward in May, 1954, and at that time became a contract between the parties. Revised Code of Washington 70.41.020 cited by Petitioners is new legislation first enacted in 1955. In 1954 Revised Code of Washington 70.40.020 defined a hospital to be for the purpose of that legislation: . . . "'Hospital' includes public health centers and general, tuberculosis, mental, chronic disease and other types of hospitals, and related facilities, such as laboratories, out patient departments, nurses homes and training facilities, and central service facilities operated in connection with hosptals . . ."

A check reveals no decisions of the Supreme Court of Washington on any of the state statutes relating to hospitals. The limited number of cases from all jurisdictions construing hospital policies may be found in an annotation at 35 A.L.R. 897 following the Washington case of *Rew v. Beneficial Standard Life Ins. Co.* 41 Wn. (2d) 577, 250 P. (2d) 956, 35 A.L.R. (2d) 891 entitled "What Constitutes a 'hospital' within coverage or exclusionary clauses of hospitalization policy". In Rew v. Beneficial Standard Life Ins. Co. the policy specifically excluded nursing

homes and convalescent homes. Where the evidence showed that Valley View Convalescent Home was both in name and in fact a convalescent home the lower Courts decision for insured was reversed.

There is no conflict with decisions of the State of Washington either. As early as 1905 the Supreme Court of Washington in *Starr v. Aetna Life Ins. Co.* 41 Wash. 199 at page 203, said . . .

> "It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the Supreme Court of Alabama in *Equitable Accident Ins. Co. v. Osborn* 90 Ala. 201, 9 South. 869, 13 L.R.A. 267:
>
> > "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy' " . . .

And in 1949 the Supreme Court said that a policy of insurance will be liberally construed in favor of the object to be accomplished and conditions and provisions therein will be strictly construed against the insurer. *Jack v. Standard Marine Ins. Co.* 33 Wn. (2d) 265, 205 P. (2d) 351.

Rew v. Beneficial Standard Ins. Co. 41 Wn. (2d) 577, 250 P. (2d) 956 (1952), 35 A.L.R. (2d) 891 had this wording in its policy:

> "The word hospital as used in this policy shall not include a rest, convalescent or nursing home."

There was no such exclusion in the Reserve policies of specific types of institutions in the instant case. These differences distinguish the Rew case from the instant case. The Rew case is the only Washington case included in 35 A.L.R. 897 annotation or its supplement.

Assuming that thousands of policy holders pay annual premiums to Petitioner aggregating twenty million dollars on policies with the same definition of a hospital as contained in the Marr policies here sued on, the question which is of manifest importance to them is that when loss occurs under the policy that some of this twenty million dollars in annual premiums be used to pay their claims without prolonged

litigation as in the instant case. The right to collect the premiums incurs the duty to pay when both a U. S. District Court and a Circuit Court of Appeal have ruled that payment is due.

CONCLUSION

Far from departing from accepted judicial procedure the Circuit Court of Appeals has followed it. To have reversed the District Court would have flouted Rule 52(a) Federal Rules of Civil Procedure and settled law on Appellate procedure both State and Federal. It would have also reversed the entire trend of all the courts that have passed on hospitalization policies.

There is no state decision in Washington, nor in any other state, that is in conflict with the instant case. Most of the decisions on this type of contract have been cited in this Brief. All are in harmony with the decision of the Circuit Court in this case. Nothing in these policies, with the possible exception of additional proof on the question of what is a recognized hospital, refers to or depends upon the statutory law of Washington.

Again it appears to Respondent that Petitioner is re-arguing the facts, ignoring established rules of construction by Circuit Courts of Appeal of Findings of District Courts, and in essence and in substance is calling for the right of appeal in this case on the general supervisory powers of the Supreme Court.

when in the exercise of sound judicial discretion the privilege of certiorari is not warranted, and, of course, should not be granted, and especially so in private litigation involving no substantial public interests.

Respectfully submitted,

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